Supreme Court, U.S.
FILED

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In the Supreme Court of the United States

MICHAEL D. LARIVEE,

Petitioner,

v.

THE STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Summary

Petitioner was arrested on suspicion he was driving under the influence of alcohol. Petitioner refused to submit to the police request for a test to determine his alcohol concentration. Petitioner then asked the police to allow him to arrange for an independent test for his own use while he was held in custody. The officer refused to allow Petitioner to make those arrangements, believing that a driver is entitled to an independent test only if he first submits to a police test. The officer then detained Petitioner in jail until all evidence of his alcohol concentration was lost.

Questions

1. Is a driver's right to a fair trial denied when the state deliberately destroys physical evidence the driver has sought to preserve?

2. Is a driver's right to due process of law denied when the state deliberately destroys physical evidence the driver has sought to preserve?

3. Is a statute that requires a defendant to provide evidence to his accusers as a condition precedent to the defendant's right to preserve evidence for his own defense unconstitutional?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF FACTS 4

REASONS FOR GRANTING THE PETITION 7

I. The Minnesota Supreme Court has decided an important federal question that has not been, but should be, settled by this Court, and has decided that question in a way that is inconsistent with other decisions of this Court. 7

II. The Minnesota Supreme Court has decided an important federal question in a way that conflicts with the decisions of other states. 15

CONCLUSION 17

APPENDIX

Minnesota Supreme Court decision .....App. 1
Minnesota Court of Appeals decision .....App. 19
Scott County District Court order .....App. 28
Minnesota Supreme Court judgement ...App. 39

TABLE OF AUTHORITIES

CASES

United States Supreme Court

Arizona v. Youngblood,
488 U.S. 51 (1988).....8, 9, 10, 11, 12

Brady v. Maryland,
373 U.S. 83 (1963).....12, 13

California v. Trombetta,
467 U.S. 479 (1984).....8, 9, 10, 11, 12

Schmerber v. California,
384 U.S. 757 (1966).....4

United States v. Valenzuela-Bernal,
458 U.S. 858 (1982).....8

Watts v. Indiana,
338 U.S. 49 (1949).....7

Minnesota Courts

Friedman v. Commissioner of Pub. Safety,
473 N.W.2d 828 (Minn. 1991).....4

State v. Larivee, 656 N.W.2d 226
(Minn. 2003) 1, 5, 9, 10, 13, 14

State v. Larivee,
644 N.W.2d 100 (Minn. Ct. App. 2002).....1, 5

Other Jurisdictions

2 Hawkins, Pleas of the Crown,
c.46, § 34 (8th ed., 1824) 7

Allen v. State,
494 S.E.2d 229 (Ga. Ct. App. 1997) 16

Blaine v. Suess,
93 Wa. 722, 612 P.2d 789 (Wash. 1980) 16

Commonwealth v. Alano,
388 Mass. 871, 448 N.E.2d 1122
(Mass. 1983) 16

In Re Martin,
58 Cal.2d 509, 374 P.2d 801 (Cal. 1962) 16

In Re Newbern,
175 Cal.App.2d 862 (Cal. App. 1959) 16

Kettering v. Baker,
328 N.E.2d 805 (Ohio 1975) 16

People v. Dewey,
431 N.W.2d 517 (Mich. Ct. App. 1988) 16

Scarborough v. State,
261 So.2d 475 (Miss. 1972),
cert. den. 410 U.S. 946 (1973) 16

Smith v. Cada,
114 Ariz. 510, 562 P.2d 390 (Ariz. 1977) 15

Starrett v. Midwest City,
374 P.2d 777 (Okla. Crim. App. 1962) 16

State v. Choate,
667 S.W.2d 111 (Tenn. Crim. App. 1983) 16

State v. Johnson,
87 N.J. Super. 195, 208 A.2d 444
(N.J. Super. 1965) 16

State v. Lewis,
266 S.C. 45, 221 S.E.2d 524 (S.C. 1976) 16

State v. Munsey,
152 Me. 198, 127 A.2d 79 (Me. 1956) 16

State v. Snipes,
478 S.W.2d 299 (Mo. 1972),
cert. den. 409 U.S. 979 (1972) 16

State v. Swanson,
222 Mont. 357, 722 P.2d 1155
(Mont. 1986) 16

State v. Zoss,
360 N.W.2d 523 (S.D. 1985) 16

Walker v. State,
229 Mont. 331,
746 P.2d 624 (Mont. 1987) 16

STATUTES

28 U.S.C. § 1257(a) 1

Minn. Stat. § 169.121, subd. 1a (1998) 8

Minn. Stat. § 169.121, subd. 6 (1998) 13

Minn. Stat. § 169.123, subd. 3(a) (1998) 2, 9, 10, 11

Minn. Stat. § 169.123, subd. 4 (1998).....4, 8

Minn. Stat. § 169A.20, subd. 2 (2000).....8

Minn. Stat. § 169A.51, subd. 7 (2000).....2, 9

Minn. Stat. § 169A.52, subd. 1 (2000).....4

Minn. Stat. § 169A.52, subd. 3 (2000).....8

Minn. Stat. § 169A.52, subd. 4 (2000).....8

OPINIONS BELOW

Minnesota Supreme Court

State v. Larivee, 656 N.W.2d 226 (Minn. 2003) (reproduced at App.1).

Minnesota Court of Appeals

State v. Larivee, 644 N.W.2d 100 (Minn. Ct. App. 2002) (reproduced at App. 19)

Trial Court

The trial court's decision is not published. The trial court's order is reproduced in the Appendix at App. 28.

JURISDICTION

28 U.S.C. § 1257(a)

The Minnesota Supreme Court filed its decision on January 30, 2003, and entered its judgement on March 7, 2003. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the decision of a state's highest court that considers whether a state statute is repugnant to the Constitution, or where any right, privilege or immunity is set up or claimed under the Constitution.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Minn. Stat. § 169.123, subd. 3(a)(1998)*

Manner of making test; additional tests. (a) Only a physician, medical technician, physician's trained mobile intensive care paramedic, registered nurse, medical technologist or laboratory assistant acting at the request of a peace officer may withdraw blood for the purpose of determining the presence of alcohol, controlled substances, or hazardous substances. This limitation does not apply to the taking of a breath or urine sample. The person tested has the right to have someone of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer; provided, that the additional test sample on behalf of the person is obtained at the place where the person is in custody, after the test administered at the direction of a peace officer, and at no expense to the state.

* The above-referenced statute has since been repealed and recodified as Minn. Stat. § 169A.51, subd. 7. Minnesota's entire driving while impaired law has now been recodified as Chapter 169A. The statutory citations in this Petition refer to the statutes that were in effect at the time of Petitioner's arrest. Each citation to a repealed statute in this Petition will be followed by a footnote referring to its corresponding new statute number.

AMENDMENT V, UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI, UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV, UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On November 17, 2000, Jordan Police Officer Weierke arrested Petitioner because he suspected Petitioner was driving under the influence of alcohol.[1] Weierke transported Petitioner to the Jordan Police Department where he read Petitioner the Minnesota Implied Consent Advisory. After Petitioner was given an opportunity to consult with his attorney,[2] Weierke requested an alcohol concentration test under the implied consent law. Petitioner refused to take the officer's test. Minnesota law provides that when a test is refused, none shall be given.[3] Petitioner then requested an opportunity to arrange an independent test for his own use while in custody. Weierke explained that he was going to take Petitioner to the jail where Petitioner could speak to the jail staff about arranging his own test.

At the Scott County Jail, Petitioner was booked. Weierke stated in his report that he advised the jail staff Petitioner had requested to contact someone to conduct an independent test and that as he left the jail, he believed the staff was "in the process of providing [Petitioner] with a telephone." But Sergeant Nelson, who was on duty at the Scott County Jail when Petitioner was booked, told Petitioner that he would not be allowed to arrange an independent test. Sergeant

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[1] The record in this case consists of Officer Weierke's police report and the affidavit of Sgt. Nelson of the Scott County Sheriff's office.

[2] In Minnesota, a driver has a state constitutional right to consult with an attorney before making a decision about testing. *Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828 (Minn. 1991).

[3] Although *Schmerber v. California*, 384 U.S. 757 (1966) authorizes the non-consensual taking of a biological sample upon probable cause in an impaired driving case, Minnesota has determined that it will not take samples without consent. Minn. Stat. § 169.123, subd. 4 (repealed and recodified as § 169A.52, subd. 1).

Nelson denied the request because he believed that only a person who provides a test to the arresting officer has the right to arrange for his own test. Sergeant Nelson then placed Petitioner in custody for three days, sufficient time that all evidence of Petitioner's alcohol concentration was gone by the time he was released.

Petitioner brought a motion in the Scott County District Court to dismiss the complaint, alleging that his statutory rights, as well as his state and federal constitutional rights, were violated by Sergeant Nelson's refusal to allow Petitioner to arrange for an independent test. The district court found that Petitioner was denied his right to due process and a fair trial on the charge of driving under the influence and that dismissal was the appropriate remedy. The district court then certified the question raised to the Minnesota Court of Appeals as important and doubtful.

The Minnesota Court of Appeals held that the district court erred in concluding that Petitioner's constitutional right to due process and a fair trial were violated. It held that the legislature could require a defendant's submission to a police-administered alcohol concentration test as a condition precedent to the right to obtain independent access to that evidence.[4] A majority of the Minnesota Supreme Court affirmed that holding in a 5-2 decision.[5]

The Minnesota Supreme Court affirmed the Court of Appeals, although it recognized that appellate courts around the country have reached diametrically opposed conclusions on the exact same issue. Petitioner now urges this Court to decide whether a

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[4] *State v. Larivee*, 644 N.W.2d 100 (Minn. Ct. App. 2002).
[5] *State v. Larivee*, 656 N.W.2d 226 (Minn. 2003).

criminal defendant has a constitutional right to preserve physical evidence, regardless of his or her willingness to provide evidence to the state. In addition, this Court should decide whether the state may deliberately destroy physical evidence a defendant has specifically sought to preserve as a "penalty" for refusing to cooperate with the state.

REASONS FOR GRANTING THE PETITION

I. The Minnesota Supreme Court has decided an important federal question that has not been, but should be, settled by this Court, and has decided that question in a way that is inconsistent with other decisions of this Court.

The underlying principle in the enforcement of this country's criminal law is that ours is an accusatorial system as opposed to an inquisitorial one.[6] Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber.[7]

> Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case not by interrogation of the accused even under judicial safeguards, but by evidence independently obtained through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.'[8]

The United States Constitution secures for each person certain basic rights within this system. The Fifth Amendment protects a defendant from compelled self-incrimination and guarantees a defendant due process of law. The Sixth Amendment guarantees a defendant a fair trial in a criminal case.[9] In this case,

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[6] *Watts v. Indiana*, 338 U.S. 49, 54 (1949).

[7] *Id.*

[8] *Id.*, quoting 2 Hawkins, Pleas of the Crown, c.46, § 34 (8th ed., 1824).

[9] The Fourteenth Amendment guarantees that these rights shall not be infringed upon by the states.

this Court is being asked to consider whether the state's interference with a defendant's independent investigation of the allegations against him violates either of those amendments.

While this Court has addressed questions involving "constitutionally guaranteed access to evidence"[10] in the government's possession and evidence that has been inadvertently lost or destroyed by the government,[11] this Court has not decided whether the government may interfere with a defendant's independent investigation of his case without violating due process and the right to a fair trial, let alone doing so as a penalty for refusing to cooperate with the government's investigation. Although it is easy to confuse the issue in this case with previous cases decided by this Court, the question presented here is an unique and important federal question upon which this Court should rule, and which will repeat itself in the future if left unresolved.

States have a legitimate interest in prosecuting impaired drivers and seeking alcohol concentration evidence for that purpose. Minnesota pursues that interest with vigor. A license revocation for refusal to test in Minnesota is up to four times longer than for driving with an alcohol concentration of 0.10 or more.[12] Minnesota has even made it a crime, punishable by exactly the same penalties as driving under the influence itself, to refuse to submit to testing.[13] But in

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[10] See *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), and the cases cited therein.

[11] *California v. Trombetta*, 467 U.S. 479 (1984); *Arizona v. Youngblood*, 488 U.S. 51 (1988).

[12] Minn. Stat. § 169.123, subd. 4 (repealed and recodified as § 169A.52, subds. 3 & 4).

[13] Minn. Stat. § 169.121, subd. 1a (repealed and recodified as § 169A.20, subd. 2).

this case, the Minnesota Supreme Court has allowed the Minnesota legislature to cross the line between aggressive law enforcement and infringement on the protections afforded by the Bill of Rights.

Minn. Stat. § 169.123, subd. 3(a)[14] provides in pertinent part that:

> The person tested has the right to have someone of the person' s own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer; provided, that the additional test sample on behalf of the person is obtained at the place where the person is in custody, after the test administered at the direction of a peace officer, and at no expense to the state.

In this case, the Minnesota Supreme Court found that this statute authorized the state to prevent a defendant from obtaining his or her own alcohol concentration test if the defendant did not first provide the state with a test. The court also found that denying access to this evidence under the statute until the evidence was ultimately lost did not offend due process of law or the defendant's right to a fair trial. But by authorizing the destruction of material evidence to ensure it cannot be used in a driver's defense, Minnesota has added a weapon to the state's enforcement arsenal that the United States Constitution cannot tolerate.

The Minnesota Supreme Court's ruling turned on whether the officer in this case acted in bad faith when he destroyed the evidence.[15] The court found

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[14] Repealed and recodified as § 169A.51, subd. 7(b).

[15] *See Larivee*, 656 N.W.2d at 230-31 (citing *California v. Trombetta*, 467 U.S. 479 (1984); *Arizona v. Youngblood*, 488 U.S. 51 (1988)).

that because Minn. Stat. § 169.123, subd. 3 requires a defendant to first succumb to the state's test as a condition precedent to preserving evidence for his own use, the officer's enforcement of that provision did not constitute "bad faith."[16] The court found that because the officer followed the statute here, the statute is constitutional. This circular reasoning essentially holds that the constitutionality of a statute cannot be challenged so long as an officer followed the statute. Such a holding is repugnant to the entire concept of separation of powers and judicial review. The Minnesota Supreme Court's decision should not have turned on, or even considered, the officer's good or bad faith.

The Minnesota Supreme Court's idea that an officer's motive should be considered in analyzing the destruction of evidence arises out of this Court's decisions in *California v. Trombetta*[17] and *Arizona v. Youngblood*.[18] But the Minnesota Supreme Court's reliance on those cases was misplaced because those cases are factually and legally distinct from the present case.

In *Trombetta* and *Youngblood*, this Court was asked to address whether the defendants' rights to due process and a fair trial were violated when the state failed to preserve evidence *it had in its possession*. Those cases are factually distinct from the present case in that the defendants never requested that the evidence be preserved at a time when the state could have accommodated the request. And most importantly, the destruction of evidence was not

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[16] *Larivee*, 656 N.W.2d at 231.
[17] 467 U.S. 479 (1984).
[18] 488 U.S. 51 (1988).

mandated by statute as a sanction for refusing to cooperate with the state's investigation.

In *Trombetta*, the defendants complained that the officers had a mechanism for capturing and preserving a sample of the breath provided into an Intoxilyzer instrument and failed to do so, despite having never been asked. In *Youngblood*, the defendant complained that the state failed to refrigerate the victim's clothing, which precluded a biological analysis. Again, no allegation was made that the defendant had requested that the specimens be refrigerated or that the officers knew that failing to refrigerate them would result in lost evidence. In each case, this Court found that no constitutional violation had occurred because there was no effort by the officers to destroy the evidence. Here, however, there is no question that Petitioner asked to preserve the evidence at a time when it could have been preserved, that denying Petitioner's request would certainly result in the destruction of the evidence, and that the officer affirmatively refused to allow Petitioner to preserve the evidence.

In refusing Petitioner's request, the officer relied on the authority of Minn. Stat. § 169.123, subd. 3(a). Thus, the conduct at issue is that of the Minnesota legislature and not that of an officer or department, and accordingly, the bad-faith-analysis was not appropriate here. The question presented to the Minnesota Supreme Court was whether a statute that is interpreted as authorizing the pre-trial destruction of material evidence in a criminal case violates a defendant's right to due process of law and a fair trial, not whether the officer acted in good faith. The court's analysis, then, should have focused on the constitutionality of the statute, not the officer's good faith in invoking the statute.

Moreover, there is nothing in *Trombetta* or *Youngblood* that would support limiting the court's analysis to the conduct of the individual officer. If, for instance, the California Highway Patrol had a policy of not preserving breath samples even if requested to do so and *Trombetta* had an Intoxilyzer breath vial with him and requested that it be attached and filled during his test, there is no doubt from the *Trombetta* decision that the officer's claim that he was simply following department policy would not have impressed this Court.[19] Similarly, if *Youngblood* had told the officer that refrigerating the alleged victim's clothes would permit biological testing that would exonerate him and in response the officer laid the clothes out on the hood of his squad car in the Arizona sun, whether that act was the result of an individual decision or department policy, it clearly would have resulted in a different outcome in that case.[20]

Whether the "bad faith" is *individual* or *institutional*, however, is not relevant to the question of whether the state can authorize the destruction of evidence as a sanction for a defendant's refusal to provide evidence. Here, the institution known as the Minnesota legislature set forth a policy (statute) that denies a driver access to obviously material evidence

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[19] "To begin with, California authorities in this case did not destroy respondents' breath samples in a calculated effort to circumvent the disclosure requirements established in *Brady v. Maryland* and its progeny. ... The record contains no allegation of official animus toward respondents or of a conscious effort to suppress exculpatory evidence." *Trombetta*, 467 U.S. at 488.

[20] "We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form the basis for exonerating the defendant." *Youngblood*, 488 U.S. at 58.

because of the driver's decision not to ease the constitutional burden of his accusers. But the right to take full advantage of our adversarial, accusatorial system of criminal justice cannot be made contingent upon the driver's willingness to hand over evidence.

The Minnesota Supreme Court also inappropriately relied on "*Brady*[21] and its progeny"[22] in concluding that Petitioner's right to due process was not violated "in circumstances such as those present here."[23] The majority reasoned that under a *Brady* analysis, the defendant bears the burden of establishing that the destroyed evidence would have played "a significant role in [Petitioner's] defense."[24] The majority then concluded that because the officer said Petitioner had the odor of alcohol on his breath, glassy bloodshot eyes, failed a field sobriety test, admitted consuming a half bottle of wine and failed a preliminary breath test, the alcohol concentration test would likely have harmed Petitioner's defense.[25] This holding is pure and unfair speculation.

This case has never been tried. It was dismissed before trial and certified to the appellate court on the legal question alone. There has been no determination as to the admissibility of any of the evidence referred to by the court. In fact, at least some of the evidence relied upon is *not* admissible.[26] That which a jury

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[21] *Brady v. Maryland*, 373 U.S. 83 (1963).
[22] *Larivee*, 656 N.W.2d at 232.
[23] *Id.*
[24] *Id.* at 231
[25] *Id.*
[26] Minn. Stat. § 169.121, subd. 6, specifically precludes the use of the preliminary breath test at trial.

would likely hear is just as consistent with a legal amount of consumption as it is with intoxication.[27]

But none of this was relevant to the legal question that was pending before that Minnesota Supreme Court. As the dissenters noted:

> *Brady* and *Trombetta* are inapposite because in both cases the Court addressed the rights of a defendant to access evidence in the government's possession. Here, we are confronted with a very different question, to-wit, whether the statute requiring Larivee to submit to the state's blood-alcohol-level test *before* he could avail himself of an independent test violates due process of law.[28]

The question before the court was whether *the statute* passes constitutional muster, not the conduct of the police officer. Therefore, the court should not have even considered the "circumstances such as those present here."[29] The majority of the Minnesota Supreme Court improperly determined that *Brady* and its progeny controlled this case.

In the final analysis, the question raised by this case is simple. Is the ability to gather evidence to use in the defense of a criminal charge a constitutional right inherent in the Fifth and Sixth Amendments, or a gift from the legislature? If it's the latter, then the legislature can surely limit the gift to those circumstances where it feels benevolent. If it's the

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[27] The odor of alcohol is consistent with someone who drank the two glasses (half bottle) of wine Petitioner admitted drinking.
[28] *Larivee*, 656 N.W.2d at 233.
[29] *Id.* at 232

former, however, there is little doubt that the statute at issue here violates that right.

This issue has not been decided by this Court in the past and is likely to recur[30] unless this Court resolves this issue. At the moment, the statutes that authorize the destruction of physical evidence sought by an accused are limited to the arena of drinking and driving. There is nothing, however, that indicates that the Minnesota Supreme Court intended or expected to limit the legislature's power to that arena alone. The court simply held that the legislature can authorize the destruction of material and potentially exculpatory evidence in any criminal case unless the defendant first agrees to turn over evidence the state would find helpful.

II. The Minnesota Supreme Court has decided an important federal question in a way that conflicts with the decisions of other states.

As noted by the Minnesota Supreme Court, the federal question raised in this case has been resolved inconsistently by appellate courts around the country. Not only are the states' decisions inconsistent, they have actually arrived at *opposite* conclusions while passing on the exact same federal constitutional question.

The Minnesota Supreme Court cited three states (South Dakota, Michigan and Georgia) that have ruled that the right to independent testing in an impaired driving case is a statutory right, and therefore subject

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[30] See section II, below.

to conditions the legislature deems appropriate.[31] At least thirteen other states[32] have held that the right to independent testing is fundamental to constitutional due process and a fair trial, regardless of the defendant's cooperation with a state requested test.[33] With the states irreconcilably divided over such an important constitutional question, this Court should resolve the dispute.

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[31] *State v. Zoss*, 360 N.W.2d 523 (S.D. 1985); *People v. Dewey*, 431 N.W.2d 517 (Mich. Ct. App. 1988); *Allen v. State*, 494 S.E.2d 229 (Ga. Ct. App. 1997).

[32] Arizona, California, Maine, Massachusetts, Mississippi, Missouri, Montana, New Jersey, Ohio, Oklahoma, South Carolina, Tennessee and Washington.

[33] *Smith v. Cada*, 114 Ariz. 510, 562 P.2d 390 (Ariz. 1977); *In Re Martin*, 58 Cal.2d 509, 374 P.2d 801 (Cal. 1962); *In Re Newbern*, 175 Cal.App.2d 862 (Cal. App. 1959); *State v. Munsey*, 152 Me. 198, 127 A.2d 79 (Me. 1956); *Commonwealth v. Alano*, 388 Mass. 871, 448 N.E.2d 1122 (Mass. 1983); *Scarborough v. State*, 261 So.2d 475 (Miss. 1972) *cert. den.* 410 U.S. 946 (1973); *State v. Snipes*, 478 S.W.2d 299 (Mo. 1972) *cert. den.* 409 U.S. 979 (1972); *State v. Swanson*, 222 Mont. 357, 722 P.2d 1155 (Mont. 1986); *Walker v. State*, 229 Mont. 331, 746 P.2d 624 (Mont. 1987); *State v. Johnson*, 87 N.J. Super. 195, 208 A.2d 444 (N.J. Super. 1965); *Kettering v. Baker*, 328 N.E.2d 805 (Ohio 1975); *Starrett v. Midwest City*, 374 P.2d 777 (Okla. Crim. App. 1962); *State v. Lewis*, 266 S.C. 45, 221 S.E.2d 524 (S.C. 1976); *State v. Choate*, 667 S.W.2d 111 (Tenn. Crim. App. 1983); *Blaine v. Suess*, 93 Wa. 722, 612 P.2d 789 (Wash. 1980).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and reverse the decision of the Minnesota Supreme Court.

Respectfully submitted,

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App. 1

STATE OF MINNESOTA

IN SUPREME COURT

C2-01-1942

Court of Appeals

Gilbert, J.
Concurring in part,
dissenting in part, Meyer, J.
and Blatz, C. J.

State of Minnesota,

Respondent,

vs.

Filed: January 30, 2003
Office of Appellate Courts

Michael Larivee, petitioner,

Appellant.

SYLLABUS

Under the implied consent statute, Minn. Stat. § 169.123, subd. 3(a) (1998), a custodial suspect has the right to an independent blood-alcohol-level test only after first submitting to the police-administered blood-alcohol-level test.

Appellant's constitutional right to due process was not violated when the police denied the appellant the opportunity to obtain an independent blood-alcohol-level test after appellant had refused the police-administered blood-alcohol-level test.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

GILBERT, Justice.

Appellant Michael Larivee was charged with driving under the influence of alcohol—child endangerment in violation of Minn. Stat § 169.121, subd. 1(a) and subd. 3(c)(4) (1998), refusal to submit to testing in violation of Minn. Stat. § 169.121, subd. 1a and subd. 3(c)(4) (1998), and failure to properly stop at a stop sign in violation of Minn. Stat. § 169.30 (1998). The district court ruled that by being denied access to an independent blood-alcohol test, the appellant's due process right to a fair trial was violated on the driving under the influence charge but not on the refusal to test charge. The district court also found that collateral estoppel prevented appellant from relitigating whether he refused to submit to testing in violation of Minn. Stat. § 169.123, subd. 2(b), because that precise issue was addressed in the implied consent hearing.

The district court certified the case to the court of appeals pursuant to Minn. R. Crim. P. 28.03, finding that the case presented an issue of constitutional dimension, which was an issue of first impression in this state, and had been decided differently by courts around the country. The case was then stayed pending resolution in Minnesota's appellate courts.

The district court in certifying the case failed to articulate the precise question to be resolved by the appellate courts. The court of appeals heard the case and construed the certified question to be "whether a defendant's rights to due process and a fair trial are violated when he is denied his request to obtain an independent blood-alcohol-level test after he first refuses to submit to the police-administered test." *State v. Larivee*, 644 N.W.2d 100, 104 (Minn. App.

2002). The court of appeals interpreted the statute to require submission to the police-administered test as a condition precedent to the right to obtain an independent test, found no merit on constitutional claims, and held that collateral estoppel did not apply here because the result in a civil proceeding cannot be used to bind a criminal defendant on any element of the crime. We affirm.

The incident that gave rise to the charges occurred at 3 p.m. on Friday, November 17, 2000, when the appellant was picking up two children from the Jordan High School parking lot. A police officer stopped the appellant after he saw him make an excessively wide turn and disregard a stop sign. While speaking with appellant, the officer smelled the strong odor of alcohol on the appellant's breath, saw that his eyes were glassy and bloodshot, and noticed that his speech was slightly slurred. The appellant failed the field sobriety tests administered by the officer. When asked by the officer if he had been drinking, appellant admitted drinking a "half bottle" of wine during his 2 p.m. lunch. The officer then administered a portable breath test to appellant, which he failed. The officer read the Minnesota Implied Consent Advisory and the appellant asked to call an attorney. After talking to his attorney on the telephone from the police station, the appellant said, "Upon advice of my attorney, I don't feel like taking it." Then, reading from a note he had made stated, "However, I would request my own test from an individual outfit that would come out here to the jail station." Appellant was taken to the Scott County Jail. The arresting officer advised the jail staff that appellant had requested his own test, and left the jail believing the jail staff was providing the appellant a telephone.

While being booked, appellant again requested his own test. The booking sergeant, without conferring

with anyone else, denied that request because he believed that "only a person who has completed a test at the arresting officer's request has the right to arrange for his own test." The district court took judicial notice of the fact that appellant's first opportunity to go before a Scott County judge for a bail hearing was the Monday following appellant's Friday afternoon arrest.

I.

The district court certified this case to the court of appeals without formulating a precise legal question. A certified question "should be carefully and precisely framed so as to present distinctly and clearly the question of law involved." *Thompson v. State*, 284 Minn. 274, 277, 170 N.W.2d 101, 103 (1969). When the district court fails to properly frame the issues, the appellate court has the authority to clarify the question certified. *See State v. Wicks*, 258 N.W.2d 598, 599-60 (Minn. 1977). Therefore, this court as a preliminary matter must decide precisely what question is to be addressed. In this case, the district court certified only the issues relating to the driving under the influence charge, not those stemming from the refusal to submit to testing charge. The primary issue is whether the appellant's constitutional right to due process and a fair trial was violated with regard to the driving under the influence charge when, while in custody, he was denied the opportunity to obtain an independent blood-alcohol-concentration test. To fully address that question this court must first determine the extent of the statutory right to an independent test. Finally, this court granted a petition for cross-review of whether the appellant can be barred from litigating in his criminal driving under the influence trial an issue previously decided in a civil implied consent hearing.

The first issue is whether Minn. Stat. § 169.123, subd. 3(a) (1998)[1], required appellant to submit to a police administered blood-alcohol-concentration test as a condition precedent to accessing his own independent test. This court reviews questions of statutory interpretation de novo. *Scott v. Minneapolis Relief Ass'n, Inc.*, 615 N.W.2d 66, 70 (Minn. 2000). When interpreting a statute, this court's purpose is to determine the intent of the legislature. *Kulinski v. Medtronic Bio-Medicus*, Inc., 577 N.W.2d 499, 502 (Minn. 1998). "A statute should be interpreted, whenever possible, to give effect to all of its provisions, and 'no word, phrase, or sentence should be deemed superfluous, void, or insignificant.'" *Baker v. Ploetz*, 616 N.W.2d 263, 269 (Minn. 2000) (quoting *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)). Words and phrases are to be given their ordinary meaning. *Baker*, 616 N.W.2d at 268.

Minnesota Statutes § 169.123, subd. 3(a) states in relevant part:

> The person tested has the right to have someone of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer; provided, that the additional test sample on behalf of the person is obtained at the place where the person is in custody, after the test administered at the direction of a peace officer, and at no expense to the state.

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[1] Since the incident that gave rise to this event, Minn. Stat. § 169.123, subd. 3(a), was repealed by Act effective Jan. 1, 2001, 2002, ch. 478, art. 2, § 8, 2000 Minn. Laws 1484, 1537-38. The current law on this topic, Minn. Stat. § 169A.51, subd. 7(b) (2002), uses the identical language as the version of the statute at issue here.

The sentence in the statute that creates the right to an independent test starts by stating, "The person tested has the right." Here, the appellant refused the police-administered test, and none was taken. Thus, he was not a "person tested" and under the statute had no right to obtain an independent test. Likewise, the statute makes provision for an independent chemical test "provided" that certain conditions are met. The word provided generally means "on condition that."[2] The conditions in this statute are that the additional test occurs at the place of custody after the peace officer administers the test and at no expense to the state. The language of the conditions set forth in the statute includes the phrases "in addition," "additional test," and "after the test administered," all of which indicate that the statute is intended to grant a statutory right only to those who have first submitted to the police-administered test.

Therefore, we hold that when a person charged with a Minn. Stat. § 169.123, subd. 3(a) related driving charge is in custody, the person must submit to the state's test as a condition precedent to the right to an independent test. Here, appellant was in custody and refused to allow the police officer to direct the administration of the state's chemical test. As such, appellant was not charged with driving with over .10 blood-alcohol level pursuant to Minn. Stat. § 169.121, subd. 1(d) (1998). Minnesota Statutes § 169.123, subd. 3(a) allows for an additional test on condition that other statutory requirements are met. Thus, we affirm the court of appeals as to the statutory interpretation.

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[2] *Webster's Third New International Dictionary*, 1827 (1993).

II.

Next, we address the issue of whether appellant's constitutional right to due process and a fair trial was violated when the appellant was denied the right to obtain an additional test sample of his blood-alcohol concentration because he had refused to submit to the state's test. The district court found that denying the appellant the right to secure his own test after he had refused the officer-administered test violated due process. The district court judge believed that when the defendant was not "immediately released from custody and therefore able to obtain his own test," it was "fundamentally unfair" to "den[y] [him] the right to obtain any evidence of value concerning any criminal DUI charge."

In coming to that conclusion, the district court found the reasoning of the Montana Supreme Court in *State v. Swanson*, 722 P.2d 1155, 1157 (Mont. 1986), persuasive and quoted the holding from that case, "[w]hen the crime involves intoxication, the accused has a right to obtain a sobriety test independent of that offered by the arresting officer." However, in *Swanson*, the appellant was allowed to obtain his own test and he did so. But, the police failed to properly preserve the sample while he was in custody and, therefore, it could not be used because of spoliation. *Id.* at 1156.

Neither the district court decision nor the Montana case upon which it relied adequately addresses the appropriate authority for deciding when a denial of access to evidence amounts to a due process violation. *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny provide the standard for determining when due process is violated. This court has found that to succeed on a *Brady* claim, defendant must show (1) that the evidence at issue was favorable to him; (2) that evidence was willfully or inadvertently

suppressed by the state; and (3) that he was thereby prejudiced. *Woodruff v. State*, 608 N.W.2d 881, 888 (Minn. 2000) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

In *California v. Trombetta*, 467 U.S. 479, 488 (1984), the Supreme Court held that the state's failure to preserve breath samples for defendants charged with driving while intoxicated did not violate the Federal Constitution. The Court held that the Constitution only requires states to preserve evidence, "that might be expected to play a significant role in the suspect's defense." *Id.* at 488. The Court went on to hold that to meet that standard, the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489. The Court, in ruling that the conditions were not met, based its decision, in part, on the reliability and accuracy of the equipment used, and found that the chance the breath samples were exculpatory was extremely low. *Id.*

In the case before this court, the appellant refused to take the police-administered blood-alcohol-concentration test and was subsequently denied access to an independent test. In *Trombetta*, the evidence not preserved by the police was captured breath samples. *Id.* Here, the evidence the police did not allow the appellant to capture and preserve was a measurement of the level of alcohol in his blood stream. In *Trombetta*, there were test results once available; here there are none. Thus, the analysis must turn on whether an independent alcohol-concentration test possesses an exculpatory value apparent at the time the access to the test was denied. We must determine

if an alcohol-concentration test might be expected to play a significant role in appellant's defense.

Because appellant did not take the test, he was not charged with driving with blood-alcohol level over .10 in violation of Minn. Stat. § 169.121, subd. 1(d). He was charged with driving under the influence. While the test may have been probative of driving under the influence, it could not be expected to play a significant role in appellant's defense in light of the fact that appellant had the odor of alcohol on his breath, had glassy bloodshot eyes, failed the field sobriety test, admitted to drinking a half bottle of wine shortly before, and failed the portable breath test. The court of appeals found no merit in appellant's constitutional argument and stated that, "Larivee points to nothing to suggest that an independent test would not have corroborated intoxication." *Larivee*, 644 N.W.2d at 105. We agree.

Even if the independent blood test met the standard of constitutional materiality presented above, for the appellant to prevail under the *Trombetta* standard he must show he was "unable to obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 489. There is no evidence in the record that the alcohol-concentration tests administered by the state are inaccurate. Indeed, in oral argument before this court, defense counsel conceded he was unaware of any difference in the reliability of the test administered by the police and an independent test. The only difference pointed out is that police have possession of the test they administer, but not the independent test. As such, based on this record, the police-administered test the appellant refused was comparable evidence reasonably available to him.

Appellant attempts to distinguish the facts of this case from *Trombetta* by arguing that the officer here acted in bad faith; whereas, in *Trombetta* and *Arizona v. Youngblood*, 488 U.S. 51, 56 (1988), the police acted "'in good faith and in accord with their normal practice.'" *Trombetta*, 467 U.S. at 488 (quoting *Killian v. United States*, 368 U.S. 231, 242 (1961). Based on the record before this court, there is no evidence of bad faith. The district court's findings of fact indicate that the booking officer, without conferring with anyone else, refused appellant's request for his own test made during the routine booking process. The booking officer based this refusal on his belief that "only a person who has completed a test at the arresting officer's request has the right to arrange for his own test." Here, it is clear that the denial of access, although deliberate, was made without animus and in accord with what the booking officer believed was the appropriate procedure. Furthermore, as the court of appeals noted, the state too is without a chemical test to use against the appellant. *Larivee*, 644 N.W.2d at 106.

There are cases from other jurisdictions that have found that denying a defendant access to an independent test upon refusal to submit to the state's test is a violation of due process. The case the district court found persuasive, *State v. Swanson*, 722 P.2d 1155 (Mont. 1986), is one. Intermediate appellate courts in Arizona and Tennessee have concluded similarly. *See Smith v. Cada*, 562 P.2d 390 (Ariz. Ct. App. 1977); *State v. Choate*, 667 S.W.2d 111 (Tenn. Crim. App. 1983).[3]

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[3] The dissent cites dicta from three cases where courts opined that drivers had a constitutional right to an independent test, regardless of their compliance with police-administered exams. *Swanson*, 722 P.2d 1155 (Mont. 1986); *State v. Lewis*, 221 S.E.2d 524, (S.C. 1976); *State v. Choate*, 667 S.W.2d 111 (Tenn. Crim.

However, many other jurisdictions that have addressed this issue have found no due process violation. In *State v. Zoss*, 360 N.W.2d 523, 524 (S.D. 1985), the South Dakota Supreme Court was faced with a similar situation where the defendant refused a state administered test and then requested her own independent test. The South Dakota Supreme Court followed *Trombetta* and *Brady* and found that there was no assurance that the blood test would be exculpatory. *Zoss*, 360 N.W.2d at 354. That court went on to state that it was the defendant who withheld the evidence by refusing to submit to the test, not the state. *Id.*

Likewise, intermediate courts of appeal in Michigan and Georgia have held that a defendant's due process rights are not violated by being denied the opportunity to access an independent test after having refused to submit to the state's test.[4]

The supreme courts of Indiana and Arkansas, without addressing the constitutional issues, have found that the statutes in those states require submission to the state's test as a prerequisite to obtaining an independent test. *See Hill v. Otte*, 281 N.E.2d 811 (Ind. 1972), *McEntire v. State*, 808 S.W.2d 762 (Ark. 1991).

This court concludes that the constitutional due process issue in this case should be addressed

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App. 1983). In another case cited by the dissent, the constitutional issue is not addressed; rather, the court held that statutory law required that a driver be granted access to an independent test even when refusing the police-administered test. *State v. Dressler*, 433 N.W.2d 549 (N.D. Ct. App. 1988).

[4] *See People v. Dewey*, 431 N.W.2d 517 (Mich. Ct. App. 1988); *Allen v. State*, 494 S.E.2d 229 (Ga. Ct. App. 1997).

consistent with *Brady* and its progeny. Thus, we join the jurisdictions that have found no constitutional violation in circumstances such as those present here. We affirm the court of appeals and hold that the appellant's constitutional right to due process and a fair trial was not violated when, while in custody, he was denied the right to obtain an independent blood-alcohol-concentration test after having refused to submit to the police-administered test.

Having decided in the state's favor on the primary issue in this case, we need not address the state's argument that the doctrine of collateral estoppel bars the appellant from litigating in his criminal DUI trial a legal issue previously litigated in the implied consent proceeding arising from the same incident.

Affirmed.

App. 13

CONCURRENCE/DISSENT

MEYER, Justice (concurring in part, dissenting in part).

I agree with the majority's interpretation of Minn. Stat. § 169.123, subd. 3(a) (1998). I disagree with the majority's conclusion that the statute is constitutional; to condition an individual's right to access evidence for his or her defense on the state's access to that same evidence deprives an individual of his or her due process right to gather possible exculpatory evidence.

A person arrested in Minnesota for driving while intoxicated is brought into a system of laws designed to effectively detect, deter, and punish his or her conduct. Our laws exact serious civil, criminal, and financial penalties for someone suspected of driving while impaired. Minnesota statutes permit a police officer who suspects an individual is driving while impaired to "require the driver to provide a sample of the driver's breath for a preliminary screening test." Minn. Stat. § 169A.41, subd. 1 (2002).[5] If the driver refuses the preliminary screening test, his or her refusal is admissible evidence in a criminal prosecution for drunk driving. Minn. Stat. § 169A.45, subd. 3 (2002).[6] In addition, if a driver refuses either a blood, breath, or urine test after the preliminary screening test, he or

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[5] Although the sections were numbered differently in 1998, I will cite the current statutes. The consequences for refusing to take a breath or chemical test have been the same since 1998.

[6] The admission of the refusal highlights the fact that a prosecution for driving while impaired is not stymied by a suspect's refusal to submit to testing. Officers simply testify to an accused's guilt based on the same factors that gave them probable cause to require the test.

she faces two potential sanctions: (1) the state revokes his or her driver's license for a year under the state's civil administrative powers, and (2) the refusal is a crime with its own punishment. Minn. Stat. § 169A.52, subd. 3 (2000); Minn. Stat. § 169A.20, subds. 2, 3 (2002).

Minnesota and federal case law uphold the state's legitimate interest in encouraging drivers to submit to chemical testing. The United States Supreme Court has upheld a state's right to act on that interest by requiring a suspected intoxicated driver to submit to a blood-alcohol test, and legislating that an individual's refusal to consent to such a test can be introduced as evidence of intoxication. *See South Dakota v. Neville*, 459 U.S. 553, 566 (1983); *Schmerber v. California*, 384 U.S. 757, 770-72 (1966). We have held that a criminal prosecution for refusal to submit to chemical testing does not violate Fifth Amendment rights of people suspected of drunk driving. *See McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 855 (Minn. 1991).

The majority's holding today, however, oversteps legitimate boundaries of what the state can do to compel a suspect to give a potentially inculpatory chemical sample. Larivee was punished for his refusal to take the state's test. He was charged with test refusal and his driver's license was revoked. The majority penalizes him further by disallowing him access to his own test, a penalty not permitted under the constitutional right to due process and a fair trial.

The majority relies on *Brady v. Maryland*, 373 U.S. 83 (1963), and *California v. Trombetta*, 467 U.S. 479 (1984), for guidance in deciding when a denial of access to evidence amounts to a due process violation. *Brady* and *Trombetta* are inapposite because in both cases the Court addressed the rights of a defendant to

access evidence in the government's possession. Here, we are confronted with a very different question, to-wit, whether the statute requiring Larivee to submit to the state's blood-alcohol-level test *before* he could avail himself of an independent test violates due process of law.

At issue in *Trombetta* was whether California was obligated *to preserve* potentially exculpatory evidence it had gathered. Trombetta complained of the failure of California police to preserve breath samples that police had gathered for independent testing. Before reaching the issue, however, the Court set out three categories of "access-to-evidence" cases. One category involved the government's obligation to turn over exculpatory evidence in its possession to the accused. Another category, applicable to the facts of *Trombetta,* involved the government's duty to preserve evidence in its possession for defendants. In addressing the government's duty to preserve evidence in such a case, the Court set out a two-part test of constitutional materiality. Preservation is required where the evidence at issue is obviously exculpatory and the defendant has no reasonable alternative method of obtaining comparable evidence. *Trombetta,* 467 U.S. at 489. The Court later added that the defendant must also show bad faith by the police to prevail. *Arizona v. Youngblood,* 488 U.S. 51, 58 (1988). Because *Trombetta* was concerned with the "preservation" of evidence and not the attainment of evanescent evidence in the first instance, it does not provide the appropriate analysis for this case.

It was the third category of cases set out in *Trombetta*—described by the Court as "less clear" and left undecided—that encompasses our case today. This category involved "the extent to which the Due Process Clause imposes on the government the additional

responsibility of guaranteeing criminal defendants access to exculpatory evidence *beyond the government's possession.*" *Trombetta*, 467 U.S. at 486 (emphasis added). The United States Supreme Court has not yet returned to address this category.

Under the Due Process Clause, the government must give defendants "a meaningful opportunity to present a complete defense." *Id.* at 485. The Due Process Clause protects defendants against the government "hamper[ing] a criminal defendant's preparation for trial." *Id.* at 486.[7] At a minimum, the statute at issue here hampers a driver's ability to present a complete defense by depriving him or her of the opportunity to obtain independent blood-alcohol testing unless he or she first submits to such testing by the state. The state has the right to criminally penalize the refusal to submit to the state's required test as a condition of being licensed. *See McDonnell*, 473 N.W.2d at 855. However, it is a wholly different matter to hold that the state can prevent the ability of a defendant to obtain potentially exculpatory—and importantly evanescent—evidence to defend against a criminal charge involving driving under the influence. The majority ignores this distinction and, in doing so, undermines the defendant's right to present a meaningful defense.[8] This sequence is important because of the evanescent nature of the evidence.

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[7] The Court has noted that the due process rights of defendants could be violated by a state's prejudicial and intentional delay in bringing an indictment or deporting key witnesses, because both diminish the defendant's ability to mount a defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 868-70 (1982); *United States v. Marion*, 404 U.S. 307, 324 (1971).

[8] The potential ramifications of the majority's holding may not be readily apparent from the facts before us today, but can be foreshadowed by a reference to a recent case from this court. In *Krosch*, blood-alcohol testing was not done by the state, nor

Courts around the nation concur that individuals who are accused of driving while intoxicated have a right to independent blood tests. *See, e.g., In re Koehne*, 356 P.2d 179, 180-81 (Cal. 1960); *Commonwealth v. Alano*, 448 N.E.2d 1122, 1126 (Mass. 1983); *State v. Snipes*, 478 S.W.2d 299, 303 (Mo. 1972); *State v. Dake*, 529 N.W.2d 46, 49 (Neb. 1995); and *Schroeder v. State*, 772 P.2d 1278, 1281 (Nev. 1989). Very few courts, however, have addressed the precise question of whether it is constitutional to legislate that the government is first in line to take blood-alcohol samples from the suspect. Of the three state supreme courts that have addressed this same question, two found that accused drivers had a constitutional right to an independent test, regardless of their compliance with police-administered exams. *See State v. Swanson*, 722 P.2d 1155, 1157 (Mont. 1986); *State v. Lewis*, 221 S.E.2d 524, 526 (S.C. 1976). *But see State v. Zoss*, 360 N.W.2d 523, 525 (S.D. 1985). Intermediate courts in three other states have reached the same conclusion. *See Smith v. Cada*, 562 P.2d 390, 393 (Ariz. Ct. App. 1977); *State v. Dressler*, 433 N.W.2d 549, 550 (N.D. Ct. App. 1988); and *State v. Choate*, 667 S.W.2d 111, 112 (Tenn. Crim. App. 1983).

For these reasons, I would join Montana and South Carolina and hold that Minn. Stat. § 169.123, subd. 3(a) violates the Due Process Clause of the Fourteenth Amendment by conditioning an individual's

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requested by the defendant, even though police suspected intoxication, and impairment may have provided a defense to an element of first-degree murder. *See State v. Krosch*, 642 N.W.2d 713, 716-17 (Minn. 2002). We must ask whether in that case we would have conditioned the defendant's request for access to evanescent evidence upon submission to a test by the state, when the request is made solely for the purpose of defending himself against murder charges in the first degree. I suggest we would not.

right to access potentially exculpatory evidence on the state's prior access to that evidence. The state may not unreasonably interfere with an individual's timely, reasonable attempts to secure an independent examination. Therefore, I would reverse the court of appeals and answer the district court's certified question, as construed by the court of appeals, in the affirmative.

BLATZ, Chief Justice (concurring in part, dissenting in part).

I join in the concurrence/dissent of Justice Meyer.

STATE OF MINNESOTA
IN COURT OF APPEALS

C2-01-1942

State of Minnesota,
Plaintiff,

vs.

Michael Larivee,
Defendant.

Filed April 16, 2002
Certified question answered
Gordon W. Shumaker, Judge

Scott County District Court
File No. K0021694

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Considered and decided by Willis, Presiding Judge, Shumaker, Judge, and Parker, Judge.*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

SYLLABUS

Minnesota law requires a defendant to submit to a police-administered blood-alcohol-level test as a condition precedent to the defendant obtaining an independent test. A defendant's constitutional right to due process and a fair trial is not violated under Minnesota law when the defendant refuses to submit to a police-administered blood-alcohol-level test and instead requests, but is denied, the opportunity to obtain the independent test.

OPINION

GORDON W. SHUMAKER, Judge

The state charged Michael Larivee with the driving offenses of refusing to submit to alcohol testing and driving under the influence of alcohol - child endangerment.

After his arrest, Larivee refused to take an alcohol test requested by law enforcement authorities, but instead asked to be tested independently. The authorities treated Larivee's request as a test refusal.

Larivee moved to dismiss the charges, arguing that he had statutory and constitutional rights to independent testing. The district court ruled that (1) Larivee was collaterally estopped from challenging the alleged implied-consent violation because the court in a civil proceeding had already decided that issue; (2) there was no statutory or constitutional violation as to the test-refusal charge; and (3) Larivee was denied due process on the charge of driving while under the influence of alcohol - child endangerment when law-enforcement authorities refused to permit him to obtain independent alcohol testing. The district court then certified the case to the court of appeals as presenting an important and doubtful issue.

We hold that the district court erred in ruling that there was a denial of Larivee's due-process rights. We also answer the certified question in the negative.

FACTS

Appellant Michael Larivee was driving his car in Jordan with his minor children as passengers. When he made an extremely wide turn and then drove through a stop sign, a Jordan police officer stopped him.

After Larivee did poorly on field-sobriety maneuvers and failed a preliminary breath test, the officer arrested him and took him to the police station.

At the station, the officer read the implied-consent advisory to Larivee, who said that he wanted to speak with a lawyer. The officer allowed him to call a lawyer. When Larivee finished his conversation with the lawyer, the officer requested that he submit to alcohol testing. Larivee replied that, on his lawyer's advice, he would not take a test, but stated: "However, I would request my own test from an individual outfit that would come out here to the jail station." The officer then brought Larivee to the county jail.

A deputy sheriff at the county jail denied Larivee's request for an independent test because the deputy knew Larivee had already refused the alcohol test that the arresting officer had requested, and the deputy believed that Larivee could have an independent test only after he permitted law-enforcement authorities to test him.

The state charged Larivee with the crimes of test refusal and driving under the influence of alcohol - child endangerment, as well as with a stop sign violation. Arguing that law-enforcement personnel

violated his constitutional and statutory rights by refusing to allow independent alcohol testing, Larivee moved to dismiss the charges.

The district court ruled that there was no constitutional violation as to the test refusal charge but that Larivee's

> constitutional right to a fair trial and due process was violated as it relates to Count II (DUI - child endangerment), when jail staff refused [Larivee's] request to obtain an independent test.

The court then ordered the "case * * * certified to the Minnesota Court of Appeals pursuant to Minn. R. Crim. P. 28.03."

ISSUE

Is a defendant's constitutional right to due process and a fair trial violated when the defendant refuses to submit to a police-administered blood-alcohol-level test and instead requests an independent test but is denied the opportunity to obtain the independent test?

ANALYSIS

We first consider this court's jurisdiction over the certification. A district court may, upon a motion to dismiss a complaint, certify an issue as important or doubtful. Minn. R. Crim. P. 28.03. The importance of an issue "increases with the probability that resolution of the issue will have statewide impact and the probability of reversal." *King v. Watonwan Farm Serv. Co.*, 430 N.W.2d 24, 26 (Minn. App. 1988). An issue is doubtful if there is no controlling precedent, or if there is a question of first impression with substantial ground for difference of opinion. *Emme v. C.O.M.B.*,

Inc., 418 N.W.2d 176, 179-80 (Minn. 1988).

Before certifying a question, the district court must specify the precise legal question to be answered. *State v. Brink*, 500 N.W.2d 799, 802 (Minn. App. 1993). If the district court's question is imprecise or inaccurate, this court has authority to clarify the question. *Id.*

The district court did not specify the precise legal question certified, but we recognize the issue to be as we have stated it. Thus, the question properly before us is whether a defendant's rights to due process and a fair trial are violated when he is denied his request to obtain an independent blood-alcohol-level test after he first refuses to submit to the police-administered test. This precise question has statewide impact and is one of first impression.

The implied-consent statute in effect when Larivee requested independent testing provided for independent testing after a police-administered test:

> The person tested has the right to have someone of the person's own choosing administer a chemical test or tests *in addition* to any administered at the direction of a peace officer; provided, that the additional test sample on behalf of the person is obtained at the place where the person is in custody, *after* the test administered at the direction of a peace officer, and at no expense to the state.

Minn. Stat. § 169.123, subd. 3(a) (1998) (emphasis added).

Larivee argues that the police-administered test is not a condition precedent to independent testing,

but, rather, the statute merely sets the timing sequence of testing. Accordingly, he contends that the authorities impermissibly denied him his statutory right to an independent alcohol test. He further asserts that any interpretation of the implied-consent statute that would result in the forfeiture of the right to an independent test if a police-administered test is initially refused would render the statute unconstitutional. We disagree with both arguments.

Statutory interpretation is a question of law, which this court reviews de novo. *State v. Shifflet*, 556 N.W.2d 224, 226 (Minn. App. 1996). The purpose of statutory interpretation is to determine the intention of the legislature. *Id.* "Minnesota statutes are presumed constitutional, and our power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989) (citation omitted). The party challenging the constitutionality of a statute must show beyond a reasonable doubt that the statute is unconstitutional. *Id.*

Under basic rules of statutory construction, words and phrases are to be construed according to their plain and ordinary meaning. *Baker v. Ploetz*, 616 N.W.2d 263, 268 (Minn. 2000). Minnesota's implied-consent statute is straightforward and clearly indicates that the *statutory* right to an independent test of choice arises *after* a person has submitted to the police-administered test. *See Schmidt v. Comm'r of Pub. Safety*, 486 N.W.2d 473, 475 (Minn. App. 1992) (holding right to *additional* testing occurs *after* person submits to testing under the implied consent law). The statutory right to obtain an *additional* test is thus a limited right. *Theel v. Comm'r of Pub. Safety*, 447 N.W.2d 472, 474 (Minn. App. 1989), *review denied* (Minn. Jan. 8, 1990). Larivee has not shown that this

clear statute is intended to mean anything other than what it plainly says. Thus, a proper reading of the implied-consent statute reveals that submission to a police-administered alcohol test is a condition precedent to the right to obtain an independent test.

In applying the Minnesota statute, the district court agreed with the reasoning in a Montana Supreme Court case, *State v. Swanson*, 722 P.2d 1155, 1157 (Mont. 1986). However, that case is inapposite because the Montana statute it interprets does not state that a defendant's right to an independent test is conditioned upon submission first to the police test. Mont. Code Ann. § 61-8-405(2).

Because Larivee refused the offer of a police-administered test, he failed to satisfy the condition precedent to an independent test. The law-enforcement authorities did not violate Minnesota's implied-consent law by declining to permit Larivee to obtain an independent test.

Larivee also contends that he was denied his constitutional due-process right to obtain exculpatory evidence when the deputy sheriff denied him an opportunity to obtain an independent test. *See Brady v. Maryland*, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 1196-97 (1963) (establishing due-process rights to material exculpatory evidence). The district court agreed that Larivee was denied his constitutional right to due process and a fair trial on the charge of DWI - child endangerment when he was not permitted to obtain an independent test.

To establish a due-process violation, a defendant must show that (1) the state willfully or inadvertently suppressed the evidence; (2) the evidence at issue was favorable to him; and (3) he was prejudiced as a result. *Woodruff v. State*, 608 N.W.2d 881, 886 (Minn. 2000).

First, under the undisputed facts of this case, law-enforcement authorities did not violate Minnesota law or otherwise intentionally or willfully prevent Larivee from obtaining an independent test. The authorities properly applied the plain language of the implied-consent statute. Larivee decided not to satisfy the condition precedent to independent testing and thus chose not to trigger his right to an additional test. There is nothing in this record to show or to intimate that law-enforcement authorities willfully or inadvertently, by words, acts, or omissions, interfered with Larivee's ability to satisfy the statutory condition precedent.

Second, Larivee has failed to show that the independent test results would most likely be favorable to him. The record shows that Larivee failed both the field-sobriety tests and the preliminary breath test. Furthermore, it is not disputed that Larivee also exhibited the clinical indicia of intoxication. He had glassy and bloodshot eyes, an alcohol odor on his breath, and his speech was slurred. Larivee points to nothing to suggest that an independent test would not have corroborated intoxication.

Finally, there is no merit in Larivee's claim that he is deprived of a defense. He can still defend the DWI charge, albeit without a chemical test as evidence. And, of course, the state is similarly without a chemical test to use against him.

Miscellaneous

Larivee argues that the district court erred in concluding that his due-process rights were not violated with regard to the test-refusal charge. This issue, however, has not been properly certified as important and doubtful. We therefore decline to

address it.

The state argues that collateral estoppel precludes a defendant from relitigating the issue of his claimed statutory right to independent testing because this issue was decided in the civil implied-consent proceeding. But this court has specifically stated that the result in a civil proceeding cannot be used to bind a criminal defendant on any element of a crime. *State v. Wagner*, 637 N.W.2d 330, 337 (Minn. App. 2001). Thus, collateral estoppel does not apply here.

DECISION

The district court erred in concluding that Larivee's constitutional right to due process and a fair trial relating to the DWI - child endangerment charge was violated when Larivee's request for an independent test was denied because he refused to first submit to a police-administered test. Under Minnesota's presumptively constitutional implied-consent law, a defendant's submission to a police-administered blood-alcohol-level test is a condition precedent to his right to obtain an independent test.

Certified question answered.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF SCOTT FIRST JUDICIAL DISTRICT

File No. K-00-21694

State of Minnesota,

Plaintiff,

vs. ORDER

Michael Larivee,

Defendant.

The above-entitled matter came before the Honorable Mary J. Theisen, Judge of District Court, on August 16, 2001, at the Scott County Courthouse, Shakopee, Minnesota. The parties agreed at the hearing that the issues before the Court in this test refusal and DUI (child endangerment) criminal prosecution are: (1) whether Minn. Stat. Sec. 169.123, subd. 2(b) (2000) was violated where Defendant refused to test and then was denied his request to obtain an independent test; (2) whether this issue is barred by collateral estoppel; and (3) in these circumstances, whether Defendant's constitutional right to due process and a fair trial was violated. The parties agreed to submit the case on the police reports, affidavit of a jail sergeant, and memoranda submitted after the motion hearing.

Todd P. Zettler, Scott Joint Prosecution Association, appeared as counsel for and on behalf of the State of Minnesota.

Jeffrey S. Sheridan, Attorney at Law, appeared as counsel for and on behalf of the Defendant.

Based upon the proceedings, including the memoranda of law submitted to the Court, the police reports, and affidavit of Sgt. Kevin Nelson, this Court makes the following:

FINDINGS OF FACT

1. On Friday November 17, 2000 at about 3:00 p.m., Officer Tim Weirke of the Jordan Police Department saw a car make an excessively wide right turn and drive through a stop sign.

2. Officer Weirke activated the lights on his squad and followed the car into the Jordan High School parking lot. Two children, ages 8 and 12, got into the car.

3. Officer Weirke approached the driver of the car and had him move his car so that it would no longer block traffic. Once the car was moved, Officer Weirke identified the driver as Defendant Michael David Larivee.

4. As he spoke with Defendant, Officer Weirke could smell the strong odor of alcohol on Defendant's breath. He could also see that Defendant's eyes were glassy and bloodshot. His speech was slightly slurred.

5. Officer Weirke had Defendant walk with him back to his squad car, while the two children waited in the car. He had Defendant perform field sobriety tests, which he did unsatisfactorily.

6. Defendant told Officer Weirke, when asked, that he had consumed about a "half bottle" of wine during lunch, at 2:00 p.m.

7. Officer Weirke then administered a portable breath test to Defendant, which he failed. Defendant was placed under arrest.

8. Upon being read the Minnesota Implied Consent Advisory, Defendant asked to contact an attorney. The car was towed, and the children released to a responsible adult.

9. At the police department, Defendant contacted an attorney. After speaking with the attorney, Defendant refused to test. He said, "upon advice of my attorney, I don't feel like taking it."

10. Defendant then held up a yellow piece of paper that he had cupped in his hand and read, "However, I would request my own test from an individual outfit that would come out here to the jail station."

11. Defendant was transported to the Scott County jail. There, in part, Officer Weirke advised staff that Defendant had requested a test. As Officer Weirke left the jail, he believed that jail staff were in the process of providing Defendant with a telephone.

12. Sgt. Kevin Nelson booked Defendant at the jail at about 4:00 p.m. Apparently during the booking process, Defendant requested his own test. Without conferring with anyone else, Sgt. Nelson refused Defendant's request, because he knew that Defendant had refused Officer Weirke's test request. It was Sgt. Nelson's belief that "only a person who has completed a test at the arresting officer's request has the right to arrange for his own test."

13. No evidence was presented to this Court as to whether Defendant had access to a telephone at

the jail following his booking process.

14. No evidence was presented to this Court as to how long Defendant was held in custody before he posted bail, although defense counsel represents that Defendant was in custody for 3 days. This Court takes judicial notice of the fact that the earliest opportunity Defendant would have had to be in front of a Scott County Judge for his bail hearing would have been Monday, November 20, 2000.

15. Judge Rex Stacey, in an Order dated April 16, 2001, denied Defendant's Implied Consent petition. At the implied consent proceeding, Defendant argued that the license revocation by the Commissioner of Public Safety should be rescinded because he was not given the independent test he demanded. See Scott County file C-00-24039.

CONCLUSIONS OF LAW

1. The first issue before the court, whether Minn. Stat. Sec. 169.123, subd. 2(b) (2000) was violated in this case, is barred by the doctrine of collateral estoppel. This precise issue was raised and decided by Judge Stacey in Defendant's implied consent proceeding.

2. If the Court were to consider the above issue, the Court would rule identically to Judge Stacey in the implied consent proceeding. Minn. Stat. Sec. 169.123, subd. 2(b) (2000), the law in effect when this incident occurred, provides that a person incarcerated as a result of an alleged DUI offense has the right to independent testing only after he has provided the test required by the arresting officer. The statute was not violated

when Sgt. Nelson declined to permit Defendant to obtain an independent test after Defendant first refused the test offered in the implied consent proceeding.

3. The constitutional arguments raised by Defendant in this criminal proceeding are not barred by the doctrine of collateral estoppel.

4. Defendant was not denied his constitutional right to due process or a fair trial as it relates to Count I of the criminal complaint (test refusal) by the refusal of jail staff to permit Defendant to obtain an independent test after he first refused the request of police that he submit to implied consent testing.

5. In the particular facts of this case, Defendant's constitutional right to a fair trial and due process was violated as it relates to Count II (DUI - child endangerment), when jail staff refused Defendant's request to obtain an independent test.

6. Given that this case presents an issue of constitutional dimension, is one of first impression in this State, has been decided differently by courts around the country, and is likely to recur unless resolved by the appellate courts, this Court believes that the issue presented is important and doubtful and appropriate for certification to the Minnesota Court of Appeals.

7. The Court has informed the parties in advance of its anticipated ruling in this case. Defendant has consented, pursuant to Minn. R. Crim. P. 28.03, to certification of these proceedings.

8. The attached memorandum is incorporated by reference herein.

ORDER

1. This case is certified to the Minnesota Court of Appeals pursuant to Minn. R. Crim. P. 2803.

2. The instant case currently pending in District Court is **STAYED** pending resolution of the case in Minnesota's appellate courts.

Dated: October 31, 2001 **BY THE COURT:**

/s/ Mary J. Theisen
Mary J. Theisen
Judge of District Court

MEMORANDUM

The criminal complaint against Defendant in the present case charges him with two counts: (Count I) driving under the influence - child endangerment; and (Count II) test refusal. The limited scope of this memorandum will discuss Defendant's constitutional rights to due process and a fair trial with respect to these two charges.

A person accused of a crime has the right to gather evidence on his or her own behalf. Alleged violations of this right are analyzed within a due process/14th Amendment framework. See e.g. Pennsylvania v. Richie, 480 U.S. 39, 107 S.Ct. 989 (1987). The right to a fair trial is fundamental to due process. U.S. Const. Amend. XIV. A violation of the right to obtain exculpatory evidence results in a violation of due process pursuant to the 14th Amendment. Without the right to obtain exculpatory evidence, a person cannot receive due process or a fair trial. See e.g. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) and its progeny. To succeed in a showing that a person was denied his right to due process by a violation of the right to obtain exculpatory evidence, the person must make a showing that the exculpatory value of the evidence was both "apparent and material." State v. Friend, 493 N.W.2d 540, 545 (1992) (concerning lost or destroyed evidence), citing California v. Trombetta, 467 U.S. 479, 488-89, 104 S.Ct. 2528 (1984).

COUNT I: DUI-Child Endangerment

As it relates to Count I, driving under the influence of alcohol, the Court concludes that Defendant's alcohol concentration at the time of driving is "material" to the criminal charge of DUI. The State has recognized this by creating a criminal penalty for

driving with an alcohol concentration of greater than 0.10. At issue, then, is whether the exculpatory value of any evidence to be obtained via an independent test is "apparent." State v. Friend. 493 N.W.2d at 545.

The State argues that it is not; pointing out that any evidence to be obtained in the present case would likely be inculpatory, not exculpatory. While that may be true, particularly given the facts of this case, it is not necessarily so. Measuring the precise amount of a person's blood alcohol concentration can only be done with scientific means. Therefore, the precise level cannot be known without a scientific test. Given that alcohol dissipates from one's system in a matter of hours, it is obviously critical that any test obtained must be obtained with rapidity. The only way to concretely determine whether the evidence in the present case was inculpatory or exculpatory would be through scientific testing.

The State also argues that, if Defendant truly wanted to obtain exculpatory evidence, all Defendant had to do was to submit to the State's test, as required by statute. This belies the notion that a Defendant should be able to obtain evidence in his own case without the assistance of the State. Clearly, had Defendant given the test at the request of law enforcement, then the State would have had the evidence to use against Defendant, if it wished. If Defendant obtained his own test, however, the Minnesota Rules of Criminal Procedure provide that the evidence obtained from the test need not be disclosed to the State unless the Defendant intended to offer evidence about the test at his trial. Minn. R.

Crim. P. 9.02(2).[1]

Further, reading the statute as suggested by the State would require that a person submit to testing at the State's request, and if the person does not, he subjects himself to prosecution for that refusal and could receive licensing as well as other possible sanctions, including jail time. Moreover, the person would also be denied the right to obtain any evidence of value concerning any criminal DUI charge unless he was immediately released from custody and therefore able to obtain his own test. This is fundamentally unfair.

This Court agrees with the reasoning of the Supreme Court of Montana in State v. Swanson, 722 P.2d 1155, 1157 (Mont. 1986), wherein the Court analyzed a similar situation. The issue raised in Swanson was whether the driver in an offense involving intoxication had the right to obtain an independent blood test to establish his sobriety, regardless of whether he first submitted to a police test. The Montana Court held that, "when the crime involves intoxication, the accused has a right to obtain a sobriety test independent of that offered by the arresting officer." Id. There is also a substantial body of case law standing for the proposition that due process requires that an accused be given a reasonable opportunity to secure an independent test at his request and expense. See State v. Zoss, 360

[1] This section provides, in part, that a Defendant must disclose to the prosecutor results of tests taken in connection with the case if the Defendant intends to introduce evidence concerning the test at trial.

N.W.2d 523, 525, 526 (S.D. 1985)[2]; State v. Livesay, 941 S.W.2d 63, 65 (Tenn.Crim.App. 1986) (citing several cases supporting this proposition as discussed in John P. Ludington, Annotation, Drunk Driving: Motorist's Right to Private Sobriety Test, 45 A.L.R.4th 11 (1986)).

To vitiate the right to obtain independent testing after a refusal, all police must do is to offer the Defendant a telephone via which to obtain his own test within a reasonable period of time. E.g. Cosky v. Comm'r, 602 N.W.2d 892 (Minn.Ct.App. 1999), rev. denied (Jan. 18, 2000). The State has offered no evidence about the availability of a phone once Defendant was booked. Rather, the only evidence (via the affidavit of Sgt. Nelson) is that Defendant was denied the opportunity to take a test. This Defendant's first opportunity to take an independent test would have been three days later, when he was released from jail. Obviously, any test given at that late date would have no meaning. Under this factual scenario, Defendant's right to due process was violated by law enforcement's refusal to allow Defendant to obtain an independent test.

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[2] Citing Brown v. Municipal Court of Los Angeles Judicial District, 86Cal.App.3d 357, 150 Cal.Rptr. 216 (Cal.Ct.App. 1978); In re Newbern, 175 Cal.App.2d 862, 1 Cal.Rptr. 80 (Cal.Ct.App. 1959); State v. Munsey, 152 Me. 198, 127 A.2d 79 (1956); Commonwealth v. Alano, 388 Mass. 871, 448 N.E.2d 1122 (1983); People v. Burton, 13 Mich.App. 203, 163 N.W.2d 823 (Mich.Ct.App. 1969); Scarborough v. State, 261 So.2d 475 (Miss. 1972) cert. denied, 410 U.S. 946, 93 S.Ct. 1353; State v. Snipes, 478 S.W.2d 299 (Mo. 1972), cert. denied, 409 U.S. 979, 93 S.Ct. 332; City of Kettering v. Baker, 42 Ohio St.2d 351, 328 N.E.2d 805 (1975); State v. Lewis, 221 S.E.2d 524 (S.C. 1976); City of Blaine v. Sues, 93 Wash.2d 722, 612 P.2d 789 (1980); Tacoma v. Heater, 67 Wash.2d 733, 409 P.2d 867 (1966)

COUNT II - Refuse to Submit to Test

As it relates to the test refusal charge, however, Defendant's constitutional right to due process was not violated. The results of any breath test that Defendant may have obtained would not have been exculpatory as it relates to that charge. The exculpatory value of any evidence that he might have obtained via an independent test would not be "material," because it is not evidence that would bear on the issue of whether or not he refused a test.

Defendant argues that the test is material to the facts of this case, because the officer needed probable cause for the arrest and invocation of the implied consent advisory. Given the facts of this case, however, whether Defendant's blood alcohol level was .03 or .23 is immaterial to the issue of whether he refused the test. The officer clearly had sufficient probable cause to invoke the implied consent: i.e. poor driving conduct, failure of field sobriety tests, failure of PBT, and Defendant's admission to drinking a "half bottle" of wine about an hour prior to the stop. Whether Defendant's blood alcohol was minimal or not does not relate to whether the officer, from the officer's perspective, had probable cause to believe that Defendant was operating his motor vehicle while under the influence of alcohol sufficient to invoke the implied consent advisory. Therefore, insofar as it relates to Count II - test refusal, Defendant's right to due process was not violated.

MJT

STATE OF MINNESOTA **JUDGMENT**

State of Minnesota,
Plaintiff,
vs.
Michael Larivee,
Defendant.

Court of Appeals

Supreme Court #
98C201001942

Trial Court #
K0021694

Pursuant to a decision of Minnesota Supreme Court duly made and entered, it is determined and adjudged that the Scott County District Court's certified question, be and the same hereby is answered in the negative and judgement is entered accordingly. A certified copy of the entry of judgement and the court's decision is herewith transmitted and made part of the remittitur.

Dated and signed: March 7, 2003

FOR THE COURT

Attest: Fredrick K. Grittner
Clerk of the Appellate Courts

By: /s/
Assistant Clerk